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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KATHLEEN EILERSON

and

GEORGE GARDENER

Petitioners,

vs.

THE STATE OF OHIO,

Respondent.

On Writ of Certiorari to the Court of Appeals
for the First Appellate District
Hamilton County, Ohio

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT HAMILTON COUNTY, OHIO

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS VIOLATED BY THE CONVICTION OF ONE ACCUSED OF CRIME THROUGH THE USE OF LAY OPINION TESTIMONY BY A POLICE OFFICER AS THE SOLE EVIDENCE TO THE EFFECT THAT FACTS CONSTITUTING ONE OF THE ESSENTIAL ELEMENTS OF THE CRIME EXIST.

II. WHETHER THE ADMISSION OF LAY OPINION EVIDENCE OF A POLICE OFFICER THAT THE ACCUSED POSSESSED MARIJUANA FOR DISTRIBUTION RATHER THAN FOR PERSONAL USE VIOLATES THE RIGHT OF THE ACCUSED TO CONFRONT THE WITNESSES AGAINST HIM WHERE THE OFFICER EXPRESSES AN OPINION RATHER THAN A FACT WITHIN HIS PERSONAL KNOWLEDGE.

III. WHETHER ONE ACCUSED OF CULTIVATION OF MARIJUANA MAY BE CONSTITUTIONALLY CONVICTED WHERE THE SOLE EVIDENCE AGAINST HIM IS THE CIRCUMSTANTIAL FACT THAT MARIJUANA PLANTS WERE FOUND GROWING RANDOMLY ON HIS LAND.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT HAMILTON COUNTY, OHIO

PETITION

Kathleen Eilerson and George Gardener, Petitioners herein, respectfully pray that a writ of certiorari issue to review their convictions of preparation for distribution and cultivation of marijuana, which were affirmed by the Court of Appeals for the First Appellate District, Hamilton County, Ohio.

OPINIONS BELOW

Petitioners' convictions were affirmed on November 9, 1983, by the Court of Appeals for the First Appellate District, Hamilton County, Ohio. The Supreme Court of Ohio declined to review the case on February 1, 1984. The opinion of the Court of Appeals is set forth in Appendix A attached hereto, and the decision of the Ohio Supreme Court as appendix B.

JURISDICTION

The decision of the Supreme Court of Ohio denying review was entered February 1, 1984. The decision of the Court of Appeals below was entered November 9, 1983.

Justice O'Connor, on March 21, 1984, extended until May 1, 1984 the time for filing this Petition for Certiorari.

The jurisdiction of this Court is founded upon 28 U.S.C. Sec. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States:

> The Sixth Amendment provides, in pertinent part: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .

The Fourteenth Amendment to the Constitution of the United States:

> The Fourteenth Amendment provides, in pertinent part:
> . . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Ohio Rules of Evidence,

Rule 701: Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 704: Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.

Ohio Revised Code:

Sec. 2925.01(G)

"Cultivate" includes planting, watering, fertilizing, or tilling.

Sec. 2925.03 (A)(2), (3), (F)

(A) No person shall do any of the following

. . . .

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another;

(3) Cultivate, manufacture, or otherwise engage in any part of the production of a controlled substance.

. . . .

(F) It shall be an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge under this section for possessing a bulk amount of a con-

trolled substance or for cultivating marijuana that the substance which gave rise to the charge is in such amount, in such form, or is prepared, compounded, or mixed with substances which are not controlled substances in such a maner, or is possessed or cultivated in any other circumstances whatsoever as to indicate that the substance was solely for personal use.

STATEMENT OF THE CASE

Petitioners, Kathleen Eilerson and George Gardener, lived together in Eilerson's home in Green Township, a suburb of Cincinnati, in Hamilton County, Ohio. Their lawn was left in a natural state, and became overgrown and covered with weeds. Green Township officials had received complaints about the condition of the premises and had directed that the lawn be cut. A later inspection of the premises by an agent of the Regional Narcotics Enforcement Unit (RENU) revealed the presence of over 300 marijuana plants growing in the yard. A warrant was obtained, and 323 plants, and 23 "baggies" of marijuana were removed from the premises.

Petitioners were indicted and convicted of two felonies each in connection with the marijuana: cultivation, in violation of R.C. 2925.03 (A) (3), and preparation of marijuana for distribution, in violation of R.C. 2925.03 (A) (2). Their statutory defense, that the marijuana was for personal use, did not prevail. See R.C. 2925.03 (F).

During the trial, to establish that petitioners actually intended the marijuana for distribution and not for personal use, the state called as a witness one Thornton, a RENU agent, who testified that in his opinion the marijuana was not prepared or packaged for personal use, but for distribution. (R. 183-4). That opinion was based solely

upon the type and size of bags in which the substance was stored when recovered by police. The evidence revealed that the weight of the marijuana in the individual bags varied greatly, from as little as .2 grams (R. 197) to 27 grams (R. 222). An ounce is 28.35 grams (R. 221). A proper contemporaneous objection was lodged to the improper admission of this opinion testimony (R. 183-184), and it was assigned as error and ruled upon by the Court of Appeals (*post.* 3-a)

A RENU agent called as a defense witness testified that when drug distributing operations are raided by authorities, it is usual to find and seize a scale (used in the preparation of the substance for distribution) and cash (the proceeds of the sales) (R. 286-288). Neither a scale nor cash were seized here; cigarette papers, pipes and other paraphernalia employed in the personal use of marijuana were seized, however (R. 162-163).

No evidence as to cultivation was presented by the state other than the circumstantial fact that the marijuana plants were found growing on the premises; there was no testimony that either petitioner was seen planting, fertilizing, watering or tilling the plants as the statute requires, nor was there testimony that the marijuana was growing in orderly rows, etc.

At the appropriate times, the defense moved to dismiss or reduce the charges (R. 246, 248); the trial court felt that the opinion of the police officer that the marijuana had been prepared for distribution, and the circumstantial evidence that the petitioners were in possession and control of the premises where the marijuana had been found growing created a jury question as to the cultivation charge, despite the fact that there was no evidence that either petitioner planted, watered, fertilized or tilled the mari-

juana as the statute required. The trial court denied the motions (R. 255-257).

Petitioners were convicted of the felonies of cultivation of and preparation of the marijuana for distribution. Petitioner Eilerson received three days incarceration and probation; petitioner Gardener, on the other hand, received a prison sentence. The allegation that the judgments of conviction were based upon insufficient evidence was argued and rejected in the Court of Appeals (Op. *post*. p. 4a, 8a). The Ohio Supreme Court denied review (Appendix B, *post*.).

REASONS FOR GRANTING THE WRIT

I. DUE PROCESS IS BEING ERODED ACROSS OUR NATION BY THE MISUSE OF EVIDENTIARY RULES PERMITTING ADMISSION OF LAY OPINION TESTIMONY BY POLICE OFFICERS AS TO THE EXISTENCE OF ESSENTIAL ELEMENTS OF CRIMES, AND THIS COURT SHOULD REVIEW THIS CASE AND DECIDE THE NATURE AND EXTENT OF PROPER CONSTITUTIONAL LIMITATIONS ON THE USE OF SUCH TESTIMONY, LEST CITIZENS CONTINUE TO BE CONVICTED SOLELY UPON THE OPINION OF A POLICE OFFICER THAT THEY ARE GUILTY.

THE ISSUE

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS VIOLATED BY THE CONVICTION OF ONE ACCUSED OF CRIME THROUGH THE USE OF LAY OPINION TESTIMONY BY A POLICE OFFICER AS THE SOLE

EVIDENCE TO THE EFFECT THAT FACTS CONSTITUTING ONE OF THE ESSENTIAL ELEMENTS OF THE CRIME EXIST.

Simply put, our contention here is that the petitioners were convicted of the offense of preparing marijuana for distribution because a police officer was permitted to testify that, in his opinion, they were guilty.

Ohio Evidence Rule 701 permits the introduction of lay opinion testimony; Rule 704 permits such evidence even though it may go to an ultimate issue in the case. The application of such rules in criminal cases, and in this case, encourages the miscarriage of justice evident here.

Police officer Thornton was permitted to testify, over objection, that in his opinion, the marijuana recovered from petitioners' residence was being prepared for distribution. (R. 183-184). Specifically, the officer was permitted to answer, affirmatively, over objection, the following question:

> . . . based upon your experience as a police officer and especially your nine years with RENU, previous contacts with persons involved with marijuana that is packaged by them, do you have an opinion as to whether or not those items there, those 23 bags, were prepared for distribution?

Ohio Ev. R. 704, as did the federal rule, abolished the "ultimate fact rule," which held that a witness may not give an opinion going to the ultimate issue, because such invaded the proper province of the jury. But "[a]bolition of the ultimate fact rule does not mean that all opinions must be admitted. The ultimate fact rule did 'possess a solid core of sense' to the extent that it prevented witnesses from expressing their conclusions, not because con-

clusions in themselves are necessarily harmful but because the jury cannot ascertain what happened if it is merely told how to decide the case." 3 Weinstein's Evidence, p. 704-7. With respect to Rule 701, permitting lay opinion testimony, Judge Weinstein noted that "[courts] should bear in mind that the aim of the rule is to eliminate time-consuming quibbles over objections that would not effect the outcome regardless of how they were decided," *Id.* at p. 701-19.

Here, of course, the opinion of the officer is not a matter that was irrelevant to the outcome; on the contrary, it effectively told the jury how to decide the case. The witness may not give an opinion where the jury can be put in an equal position with the witness for drawing the ultimate conclusion, *United States* v. *Skeet*, 665 F.2d 983 (9th Cir. 1982). The jury had sufficient evidence from which to decide the ultimate issue, without the opinion of the officer that the element had been established. In effect, Thornton was expressing an opinion as to the guilt of the petitioners; admission of such an opinion is clearly prejudicial. *Patterson* v. *State*, 591 S.W.2d 356 (Ark.S.C. 1980), *United States* v. *Phillips*, 600 F.2d 535 (5 Cir. 1979).

The use of evidentiary rules such as these is sweeping the country under the guise of necessary reform and streamlining of antiquated rules of evidence. Research indicates that the rule is invoked more often on behalf of the prosecution than on behalf of defendants; that is, when the prosecution seeks to offer lay opinion evidence of police officers to establish the existence of an essential element of the offense, it is frequently admitted; where defendants seek to offer lay opinion evidence to controvert the existence of an element of the offense, it is usually excluded.

The evil implicit in such use of the evidentiary rules is akin to the vice present in *Leary* v. *United States*, 395

U.S. 6 (1969). There, the Court ruled an unconstitutional violation of due process a statutory presumption which permitted, even required, the conclusion that mere possessior of marijuana necessarily established knowledge that the marijuana was imported in violation of federal law, unless the accused satisfactorily explained such possession to the jury. The Court ruled that before the presumption could be effective, it should appear with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *Id.*, at 36.

Here, the opinion that the marijuana was prepared for distribution has an even flimsier basis than the presumption in *Leary*. The officer was permitted to give his opinion as to this ultimate fact merely because, and only because, of the presence of the marijuana in plastic bags. The Court of Appeals concluded tht the officer's opinion was admissible because "the bags of marijuana found on the defendants' premises were packaged in a form peculiar to marijuana distribution. His testimony clearly satisfied the rule." (Op., *post.*, p. 3a).

Black's Law Dictionary defines "peculiar" as "particular or special," *Id.*, Fourth Ed. p. 1287. Plastic bags are no more "peculiar," particular or special to marijuana distribution than they are to the temporary storage of peanut butter and jelly sandwiches in plastic bags in a child's school lunchbox. The conclusion of the Court of Appeals, even more than the officer's testimony itself, illustrates the danger of the application of the rules of evidence attacked here in cases such as this. The conclusion that the marijuana was packaged for distribution rather than for personal use is pure conjecture, and should not have been admitted.

Convictions and prison sentences ought not to be based

upon the unsupported and logically unfounded opinion of one charged with obtaining a conviction. The Court can restore some balance to the process by accepting review of this case and ruling that such use of state evidentiary rules constitutes a violation of the due process clause of the Fourteenth Amendment.

II. IN ADDITION TO THE DUE PROCESS VIOLATION IMPLICIT IN SUCH LAY OPINION TESTIMONY OF POLICE THAT THE ACCUSED IS GUILTY, SUCH EVIDENCE CONSTITUTES A VIOLATION OF THE RIGHT TO CONFRONT WITNESSES SECURED TO ALL BY THE SIXTH AND FOURTEENTH AMENDMENTS.

THE ISSUE

WHETHER THE ADMISSION OF LAY OPINION EVIDENCE OF A POLICE OFFICER THAT THE ACCUSED POSSESSED MARIJUANA FOR DISTRIBUTION RATHER THAN FOR PERSONAL USE VIOLATES THE RIGHT OF THE ACCUSED TO CONFRONT THE WITNESSES AGAINST HIM WHERE THE OFFICER EXPRESSES AN OPINION RATHER THAN A FACT WITHIN HIS PERSONAL KNOWLEDGE.

The Sixth Amendment, applicable to the States through the due process clause of the Fourteenth Amendment, requires that one accused of crime has the right to confront his accuser. *Pointer* v. *Texas,* 380 U.S. 400 (1965). This includes the right to cross-examine the witnesses against him. Here, while agent Thornton did testify as to his opinion that the marijuana here was prepared for distribution, and was subjected to cross-examination, since his testimony was based merely upon his opinion, and not

upon fact (unless it can be said that the fact that the marijuana was found stored in plastic bags – as are peanut butter and jelly sandwiches [which themselves by that fact cannot be rationally said to be packaged for distribution]), there was no meaningful possibility presented to the petitioners to exercise their Sixth Amendment rights by effective cross-examination as to direct testimony which was improperly and prejudicially admitted in the first place.

While we believe that the basic violation of due process detailed above outweighs this Sixth Amendment concern, the Sixth Amendment violation nevertheless contributed to petitioners' wrongful convictions.

III. THE CONVICTIONS OF PETITIONERS FOR CULTIVATION OF MARIJUANA AND PREPARATION OF MARIJUANA FOR DISTRIBUTION WERE ABSOLUTELY UNSUPPORTED BY EVIDENCE SUFFICIENT TO CONVINCE A RATIONAL TRIER OF THE FACT TO A NEAR CERTITUDE, AND MUST BE REVERSED. THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN JACKSON V. VIRGINIA.

THE ISSUES:

A.

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS VIOLATED BY THE CONVICTION OF ONE ACCUSED OF CRIME THROUGH THE USE OF LAY OPINION TESTIMONY BY A POLICE OFFICER AS THE SOLE EVIDENCE TO THE EFFECT THAT FACTS CONSTITUTING ONE OF THE ESSENTIAL ELEMENTS OF THE CRIME EXIST.

B.

WHETHER ONE ACCUSED OF CULTIVATION OF MARIJUANA MAY BE CONSTITUTIONALLY CONVICTED WHERE THE SOLE EVIDENCE AGAINST HIM IS THE CIRCUMSTANTIAL FACT THAT MARIJUANA PLANTS WERE FOUND GROWING RANDOMLY ON HIS LAND.

1. The due process clause of the Fourteenth Amendment provides that a person charged with crime is presumed innocent until each and every element of the offense with which he is charged is established by the prosecution beyond a reasonable doubt, and, where the prosecution fails to meet that burden, the accused should be adjudged innocent of that offense.

The Constitution of the United States mandates application of the presumption of innocence in criminal cases, *Taylor* v. *Kentucky* (1978), 436 U.S. 478. The Constitution also requires that the standard of proof which is cast upon the prosecution is proof beyond a reasonable doubt:

> Lest there remain any doubt about the Constitutional significance of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship (1970), 397 U.S. 358. Therefore, the Fourteenth Amendment Due Process Clause *requires* that the presumption of innocence and the reasonable doubt standard of proof are the law of all fifty states.

In *Winship*, the Court effectively stated the reasons for

the incorporation of these standards within the exalted panoply of precious Constitutional Rights:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons; the accused during a criminal prosecution has at stake an interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized. . . . Moreover, use of the reasonable doubt standard is indispensible to command the respect and confidence of the community. In applications of the criminal law it is critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that *his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty* [Emphasis added].

The decision in *Winship* necessitated a change in the approach required of reviewing courts in assessing claims that convictions had been obtained upon insufficient evidence. We next address the question of the proper standards to be used by appellate courts in such circumstances, standards which are mandated by the Constitution itself.

2. A reviewing court in a criminal case, assessing a claim of insufficient evidence, is required by the Due Process Clause to reverse unless it appears that a rational trier of the fact could conclude with near certitude that all elements of the offense have been proved.

In *Thompson* v. *Louisville* (1959), 326 U.S. 197, 80 S.Ct. 624, the Court had held that it would not reverse a

state court conviction for insufficient evidence unless the record was absolutely devoid of evidence tending to prove a material, essential element of the offense for which the accused had been convicted. Where even a mere modicum of evidence existed as to any such element, the Court refused to hold that the conviction violated the Constitution. Once *Winship* established that the reasonable doubt standard of proof was required by the Due Process Clause of the Fourteenth Amendment, however, it became evident that *Thompson* was constitutionally inadequate to set standards of review for appellate courts:

> That the *Thompson* "no evidence" rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent. "[A] mere modicum of evidence may satisfy a 'no evidence' standard. . . ." *Jacobellis* v. *Ohio*, 378 U.S. 184,202, 84 S.Ct. 1676, 1686 (Warren, C.J. dissenting). Any evidence that is relevant – that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence . . . – could be deemed a "mere modicum." But it could not seriously be argued that such a modicum of evidence could by itself rationally support a conviction beyond a reasonable doubt.

Jackson v. *Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 2790.

In *Jackson*, the Court reexamined the standards required of appellate courts in reviewing claims of insufficient evidence in criminal appeals, a reexamination compelled by the decision in *Winship*, nine years before. Since "sufficient proof" to sustain a conviction in a constitutional sense required, after *In re Winship*, evidence necessary to convince the trier of the fact beyond a reasonable doubt of every element of the offense in question, appellate courts must scrutinize more carefully the evidence produced at

trial by the prosecution, because "a properly instructed jury may occasionally convict even when it can be said that no rational trier of the fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting without a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction [citations omitted]. Under *In re Winship*, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand," *Jackson*, 99 S.Ct. at 2788-2789.

"Application of the *Thompson* [no evidence] standard to assess the validity of a criminal conviction after *Winship* could lead to absurdly unjust results. . . . Thus, a defendant whose guilt was actually proved by overwhelming evidence would be denied due process if the jury was instructed that he could be found guilty on a mere preponderance of the evidence. Yet a defendant against whom there was but one slender bit of evidence would not be denied due process so long as the jury had been properly instructed on the prosecution's burden of proof beyond a reasonable doubt. Such results would be wholly faithless to the constitutional rationale of *Winship*," *Id.*, at 2790, n14.

The Court concluded that the reasonable doubt standard was necessary, and concluded further that "[B]y impressing upon the factfinder the need to reach a subjective state of *near certitude* of the guilt of the accused, the [reasonable doubt] standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. *Id.*, 99 S.Ct. at 2787 [Emphasis added].

(A) THE PREPARATION FOR DISTRIBUTION COUNT

Here, petitioners were convicted of felonies and incarcerated merely upon the opinion of a law enforcement officer that the marijuana was prepared for distribution, and nothing more. Without the element of preparation for distribution, they could have been convicted only of lesser offenses of mere possession, and perhaps not even that, as the jury could well have concluded, without the officer's opinion, that the marijuana, though the quantity was somewhat large, was solely intended for personal use, which is an affirmative defense under Ohio law, R.C. 2925.03 (F).

Also tending to show the marijuana was intended not for distribution was the great disparity between the weights of the separate bags. Were the marijuana intended for distribution, the bags would have contained more or less the same amount. The evidence indicated that the marijuana was placed in the bags without consideration of the quantity placed in each, a fact totally inconsistent with preparation for distribution, and totally consistent with storage for personal use.

Indeed, the evidence indicates that such was the case. There was no scale found by the raiding officers, and no cash, despite the testimony of RENU officer Buffington that these items are "usually" found in raids on distribution operations; the marijuana was "bagged," it is true, but marijuana is a fungible, loose substance, and must be contained lest it scatter and the marijuana be lost. The fact that sellers usually "bag" the marijuana in "baggies" is of no import here: as sellers bag the product, in that same state do buyers purchase it, and store it for their personal use. There is no testimony that one keeping

marijuana for personal use stores it in different containers than those in which it was bought. Similarly, one who stores marijuana for his own use, whether he buys it, cultivates it, or finds it growing wild upon his land, should not be convicted of preparation for distribution merely because he places it in a container similar in appearance to containers used by sellers.

B. THE CULTIVATION COUNT

Here, there is absolutely no evidence to support the convictions. The statute defines cultivation as the "planting, watering, fertilizing, or tilling" of marijuana. R.C. 2925.01 (G). There was simply no evidence of any of these activities. The trial court acknowledged as much when, in denying petitioners' motions to dismiss the cultivation count, he indicated:

> As to cultivation, granted there is no testimony before the court that anyone actually saw either defendant actually planting, watering or fertilizing, but again this is a circumstantial issue. I am not sure that that [statutory] definition is all inclusive and limits the jury's consideration when it says includes, but I don't have to rule on that at this time. . . . the jury is in a position to infer where there were no marijuana plants, but suddenly there are marijuana plants that they were planted. That is not a conclusive fact because they could have been blown by the winds as counsel argued but it is a question of fact and the jury should be free to draw the inference and to determine that issue under circumstantial evidence.

(R. 256-7).

Ohio law requires that circumstantial evidence, to support a conviction must be consistent only with guilt, and inconsistent with any reasonable theory of innocence, *State*

v. *Kulig*, 37 Ohio St.2d 157 (1973). The circumstance that marijuana plants grew on petitioners' property, without more, while perhaps sufficient to found an inference that they knew it was there, certainly does not found the inference, beyond a reasonable doubt, that they planted or watered, or fertilized, or tilled it. There is simply no evidence on this charge. There is insufficient evidence even under the *Thompson* v. *Louisville* standard, and certainly insufficient evidence upon which a rational trier of the fact could conclude with near certitude that the charge was proved, as required by the due process clause under *Jackson* v. *Virginia*.

CONCLUSION

For the foregoing reasons, the Court is respectfully urged to grant the Petition, to issue the writ of Certiorari, to review the judgment below, and to reverse petitioners' convictions.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO, *Plaintiff-Appellee,* vs. KATHLEEN EILERSON, *Defendant-Appellant.*	Appeal No. C-820997 Trial No. B-823425
STATE OF OHIO, *Plaintiff-Appellee,* vs. GEORGE GARDNER, *Defendant-Appellant.*	Appeal No. C-820998 Trial No. B-823425

OPINION

(Filed Nov. 9, 1983)

Criminal Appeal from Court of Common Pleas

Judgment appealed from is: Affirmed

Date of Judgment entry on Appeal: November 9, 1983

Messrs. Arthur M. Ney, Jr. and William E. Breyer, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Michael P. O'Connor, Suite 700, 124 East Seventh Street, Cincinnati, Ohio 45202, for Defendant Kathleen Eilerson,

Mr. Jeffrey R. Lewis, 3886 Reading Road, Cincinnati, Ohio 45229, for Defendant George Gardener.

KLUSMEIER, J.

These causes came on to be heard upon the appeals, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the assignments of error, the briefs and the arguments of counsel.

Defendant-appellants were each charged with three counts of trafficking in drugs, to wit: preparation for distribution, cultivation and possession exceeding three times bulk amount. After a joint trial, the jury returned a verdict of guilty as to preparation for distribution and cultivation. The defendants were sentenced as appears of record. Each defendant filed a timely notice of appeal. Although not formally consolidated for appeal, these causes were consolidated for the purpose of oral argument and decision.

During the summer of 1982, the authorities in Green Township began to receive complaints about the condition of the premises at 3159 Dickinson Road where the defendants resided. The general thrust of the complaints was that the yard was not being cared for, had become overgrown and was a detriment to the community.

By means irrelevant to this appeal, the Regional Enforcement Narcotics Unit was apprised of the fact that marijuana was growing in the defendants' back yard. A valid search warrant was obtained. The ensuing search resulted in the removal of 323 growing marijuana plants and the discovery of 23 baggies of marijuana along with other drug related items.

On appeal, defendants Eilerson and Gardener bring seven and eight assignments of error respectively. Though differently numbered, six of the assignments by each appellant are similar and will be ruled upon together. Assignments of error numbers two and eight set forth in Gardener's appeal are not joined in by Eilerson and will be ruled upon separately. The assignments of error are stated in the following manner:

EILERSON ASSIGNMENT OF ERROR NO. I

> The trial court erred to the substantial prejudice of appellant by permitting the State of Ohio to introduce a lay opinion that evidence seized was prepared for distribution in support of its first count of the indictment.

GARDENER ASSIGNMENT OF ERROR NO. III

> The trial court substantially erred to the prejudice of defendant in permitting the state to offer opinion testimony that the contraband seized from the defendant was intended for sale.

We find this assignment to be without merit. Evid. R. 701 provides that a lay witness' opinion testimony is limited to those opinions that are rationally based on the witness' perception and are helpful to the determination of a fact in issue or to a clear understanding of his testimony. The testimony objected to was that of an undercover agent who had made numerous marijuana purchases during his nine years of work with R.E.N.U. The agent testified that the bags of marijuana found on the defendants' premises were packaged in a form peculiar to marijuana distribution. His testimony clearly satisfied the rule. *State* v. *Turner*, No. C-810453 (1st Dist. Sept. 8, 1982). The assignment is overruled.

EILERSON ASSIGNMENT OF ERROR NO. II

> The trial court erred to the substantial prejudice of appellant in overruling her motion for a directed verdict of acquittal made at the close of the state's case and renewed after all the evidence.

GARDENER ASSIGNMENT OF ERROR NO. V

> The trial court substantially erred to the prejudice of defendant in overruling defendant's motion for a judgment of acquittal.

As to count one of the indictment charging the defendants with preparation of the marijuana for distribution, the record reflects that there was evidence, adduced at trial, such as would allow reasonable minds to reach differing conclusions as to whether each material element had been proved beyond a reasonable doubt. *State* v. *Bridgeman* (1978), 55 Ohio St. 2d 261, 381 N.E.2d 184. Accordingly, the motions were properly denied.

We reach the same conclusion with respect to count two of the indictment concerning cultivation. During oral argument, defense counsel vigorously argued that there was no evidence, circumstantial or otherwise, proving cultivation as defined in R.C. 2925.01 (G). We disagree. We are unwilling to conclude that reasonable minds could not infer from the evidence adduced that some efforts, however minimal, were made to cultivate marijuana, particularly in view of the fact that 323 such plants were growing in the back yard of a lot located in residential community. The assignment of error is overruled.

EILERSON ASSIGNMENT OF ERROR NO. III

> The trial court erred to the substantial prejudice of appellant in refusing to permit the defendant to conduct an in court [*sic*] demonstration involving the contraband seized after permitting agent Thornton to give a lay opinion as to preparation for distribution.

GARDENER ASSIGNMENT OF ERROR NO. VI

> The trial court substantially erred to the prejudice of the defendant in refusing to permit the defendant to conduct an in-court experiment and in refusing to receive defense exhibit # 16 into evidence. (T.p. 341).

This assignment of error concerns the defendants' request to have the bags of marijuana weighed, at trial, by a R.E.N.U. agent and their request that an O House Triple Beam Scale owned by R.E.N.U. be received into evidence in order for the jury independently to weigh the bags. The court below denied both requests. We are in agreement with the court's rulings. It is within the sound discretion of the trial court to permit or deny a demonstration. *State* v. *Shelton*, No. C-800496 (1st Dist. July 8, 1981). Here there was no abuse of discretion and no prejudice to the defendants. There were several factors that militated against an in-court demonstration. First, the scale had not been calibrated and, second, the defendants could have availed themselves of the provisions of R.C. 2925.51 (F). Furthermore, five of the bags had been weighed at random by the coroner's laboratory and the results admitted into evidence. Defense counsel, therefore, were not foreclosed from arguing and, in fact, Gardener's counsel did argue that the variance in weight of the bags indicated that the marijuana was for personal use, not distribution. Thus, the defendants were in no way prejudiced in the presentation of their defense by the inability to weigh each bag

in court. With respect to the defendants' second request, we would point out that the obvious problems inherent in allowing a jury to conduct its own tests militated against the admission of the scale into evidence. We find this assignment devoid of merit.

EILERSON ASSIGNMENT OF ERROR NO. IV

> The trial court erred to the substantial prejudice of appellant when it permitted the jury to infer guilt by complicity when no evidence was offered from which the jury could reasonably infer complicity or aiding and abetting.

GARDENER ASSIGNMENT OF ERROR NO. VII

> The trial court substantially erred to the prejudice of defendant in instructing the jury on the issue of complicity and in overruling defendant's objection to the instruction. (T.p. 409).

The defendants argue that there was no evidence from which reasonable men could conclude that either of them aided or abetted the other. We disagree. The record reflects that the defendants acted in concert to cultivate the marijuana. The record also reflects that they were both connected to the marijuana found packaged in the house. It was not error for the court to have instructed the jury as to complicity.

Furthermore, we take note of the fact that, from the record, evidence tending to prove complicity was properly elicited. The state was not limited to proof that the defendants were guilty as principals simply because the defendants were charged in the indictment as principals and not complicitors. R.C. 2923.03 (F) provides that a charge of complicity may be stated in terms of the principal offense.

As there was nothing in the record, such as a Bill of Particulars, which would indicate an intent on the part of the state to limit its proof or theory of the case, it was not improper for evidence of complicity to be elicited at trial. *See State* v. *Perryman* (1976), 49 Ohio St. 2d 14, 358 N.E. 2d 1040. The assignment of error is overruled.

EILERSON ASSIGNMENT OF ERROR NO. V

> The trial court erred to the substantial prejudice of the appellant in instructing the jury on drug abuse pursuant to section 2925.11 of the Ohio Revised Code.

GARDENER ASSIGNMENT OF ERROR NO. I

> The trial court substantially erred to the prejudice of the defendant in instructing the jury on the lesser included offense of drug abuse and in overruling defendant's objection to the instructions. (T.p. 410).

The defendants argue that the giving of an instruction on the lesser included offense of each charge in the indictment was error as there was evidence of an affirmative defense, personal use, that would negate the elements of the offenses charged and no evidence that would sustain a conviction on any of the lesser offenses.

In determining whether an instruction on a lesser included offense should be given, the court must look at the nature and quality of all the evidence. The fact that the evidence adduced on behalf of the defendants would, if believed by the trier of fact, constitute a complete defense does not, in and o f itself, prevent the court from instructing on the lesser included offense. *State* v. *Davis* (1982), 6 Ohio St. 3d 91, 451 N.E.2d 772. An instruction on the lesser included offense can still be given if "the trier of fact could reasonably find against the state and for the

accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction on a lesser included offense." *State* v. *Wilkins* (1980), 64 Ohio St. 2d 382, 388, 415 N.E.2d 303, 308. Even assuming *arguendo* that the evidence was such that a conviction on the lesser included offense could not be sustained, we fail to see how the defendants were prejudiced. The two charges on which the defendants were convicted were both the greater offense. This is not a case in which the defendants, convicted of the lesser offense, were possibly prejudiced by a compromise verdict. *See State* v. *Nolton* (1969), 19 Ohio St. 2d 133, 249 N.E.2d 797. The assignment is overruled.

EILERSON ASSIGNMENT OF ERROR NO. VI

> The judgment of conviction was contrary to law and against the manifest weight of the evidence.

EILERSON ASSIGNMENT OF ERROR NO. VII

> The judgment of conviction as to count two of the indictment is contrary to law and against the manifest weight of the evidence as the evidence was uncontroverted in support of appellant's affirmative defense of personal use.

GARDENER ASSIGNMENT OF ERROR NO. IV

> The verdict of the jury is contrary to law and against the manifest weight of the evidence.

We find that none of these assignments of error has merit.

With respect to assignments of error numbers VI and IV asserted by Eilerson and Gardener respectively, we find that

substantial evidence was adduced at trial upon which a jury could reasonably have concluded that all the elements of the offense of preparation for distribution and cultivation were proved beyond a reasonable doubt. *State* v. *Eley* (1978), 56 Ohio St. 2d 169, 383 N.E.2d 132. Accordingly, the assignments are overruled.

We reach the same conclusion with respect to assignment of error number VII asserted by Eilerson. The issue raised by the defendant in conjunction with this assignment was stated in the following manner:

> Where all of the evidence presented by the State of Ohio and all of the evidence presented by appellant supports and proves an affirmative defense by a preponderance of the evidence and there is no evidence by which a jury could infer anything other than such defense a conviction of the substantive offense is contrary to law and must be reversed.

The thrust of the issue would seem to be more appropriately addressed to an error raised pursuant to the denial of a Crim. R. 29 motion than to the error actually assigned by the defendant. However, we do not find any error regardless of the intent behind the assignment. The evidence adduced at trial was not only such as would allow the issue to go to the jury, *State* v. *Bridgeman* (1978), 55 Ohio St. 2d 261, 381 N.E.2d 184, but such as would allow the jury to find the defendant guilty beyond a reasonable doubt. *Eley, supra.* The assignment is overruled.

GARDENER ASSIGNMENT OF ERROR NO. II

> The trial court substantially erred to the prejudice of the defendant in overruling defendant's motion to admit defendant's exhibit # 3 into evidence. (T.p. 344).

Exhibit number three was Eilerson's handwritten copy of a speech that she had given to the Green Township Board of Trustees in defense of the defendants' natural yard. It is urged by the state that this court need not rule on this assignment of error as counsel for Gardener never offered the exhibit into evidence or objected to its exclusion. We disagree. The record reflects that at the time the defense exhibits were offered into evidence counsl for Eilerson said that "we will move all these exhibits into evidence." (T.p. 339) Presumably, counsel for Eilerson was moving for the admission of the exhibits on behalf of Gardener's counsel as well. However, what is clear from the record is that Gardener's counsel was present both at the time the exhibits were offered into evidence and at the time exhibit number three was excluded. Consequently, we consider the offer of the exhibit into evidence and the objection to its exclusion made by Eilerson's counsel to have been made by Gardener's counsel as well. *See State* v. *Coleman*, No. C-820067 (1st Dist. Dec. 22, 1982).

On the merits, however, we are compelled to agree with the trial court. Defendant sought to admit the exhibit under Evid. R. 803 (5). This rule is inapplicable as it precludes, by its express terms, the receipt into evidence of an exhibit unless it is offered by an adverse party. We are unwilling to hold that Gardener was an adverse party as to Eilerson. Based on the record, it would be inconsistent to hold that the two defendants were so similarly situated as to treat the offer of the exhibits made by one party as made by the other while simultaneously holding that their positions were so dissimilar as to treat the exhibit as offered by an adverse party. The assignment of error is overruled.

GARDENER ASSIGNMENT OF ERROR NO. VIII

> The trial court substantially erred to the prejudice of the defendant in overruling defendant's objection to a defect in the indictment. (T.p. 3).

Prior to trial, Gardener's counsel filed a written motion objecting to the fact that the indictment showed that the defendant had an alias. The defendant moved that the alias be striken from the indictment. The defendant contends that the court's denial of the motion was prejudicial error. We disagree. First, the record reflects that the defendant was referred to by his alias on his driver's license and that it was for this reason the court refused to change the indictment. Second, any potential prejudice that might have accrued to the defendant was nullified when the court ordered all counsel to refer to the defendant as Gardener. The assignment is not well taken.

All the assignments of error having been ruled upon, it is the decision of this Court that the judgment herein appealed from be, and the same hereby is, affirmed.

PALMER, P. J. and BLACK, J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX B

THE SUPREME COURT
OF THE STATE OF OHIO

THE STATE OF OHIO,) 1984 TERM
City of Columbus.) To wit: February 1, 1984

No. 83-1885

STATE OF OHIO,

Appellee,

vs.

KATHLEEN EILERSON,

Appellant,

**MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
FOR HAMILTON COUNTY**

It is ordered by the Court that this motion is overruled.

APPENDIX C

THE SUPREME COURT
OF THE STATE OF OHIO

THE STATE OF OHIO,) 1984 TERM
City of Columbus.) To wit: February 1, 1984

No. 83-1884

STATE OF OHIO,

Appellee,

vs.

GEORGE GARDNER,

Appellant.

**MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
FOR HAMILTON COUNTY**

It is ordered by the Court that this motion is overruled.